LIBRARY
SUPREME COURT, U. S.

FILED
DEC 9 19[illegible]
[illegible], CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

FONTANA AVIATION, INC., A Corporation, *Petitioner*,

v.

BEECH AIRCRAFT CORPORATION, A Corporation, and HARTZOG-SCHNECK AVIATION, INC., A Corporation, *Respondents*.

BRIEF FOR RESPONDENT BEECH AIRCRAFT CORPORATION IN OPPOSITION

HENRY P. SAILER
CHARLES LISTER
888 Sixteenth Street, N. W.
Washington, D. C. 20006
Attorneys for Respondent
Beech Aircraft Corporation

Of Counsel:

COVINGTON & BURLING
888 Sixteenth St., N. W.
Washington, D. C. 20006

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
STATEMENT	1
ARGUMENT	5
CONCLUSION	11

TABLE OF CASES

Aetna Casualty & Surety Co. v. *Yeatts*, 122 F.2d 350 (4th Cir. 1941)	6
American Construction Co. v. *Jacksonville Railway*, 148 U.S. 372 (1893)	5, 9
Bennett v. *D.C. Transit System, Inc.*, 298 F.2d 325 (D.C. Cir. 1962)	8
Bigelow v. *RKO Radio Pictures*, 327 U.S. 251 (1946)	7
Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967)	5, 6
Capital Traction Co. v. *Hof*, 174 U.S. 1 (1899)	7
Cobbledick v. *United States*, 309 U.S. 323 (1940)	5, 6
Cohen v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949)	9
Cone v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947)	7
Continental Ore Co. v. *Union Carbide Corp.*, 370 U.S. 690 (1962)	7
Eastman Kodak Co. v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927)	7
Fairmont Glass Works v. *Cub Fork Coal Co.*, 287 U.S. 474 (1933)	7
Florists' Nationwide Telephone Network v. *Florists' Telegraph Delivery Association*, 371 F.2d 263 (7th Cir.), *cert. denied*, 387 U.S. 909 (1967)	10
Hamilton Shoe Co. v. *Wolf Brothers*, 240 U.S. 251 (1916)	5, 9
Larson v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949)	9
Moist Cold Refrigerator Co. v. *Lou Johnson Co.*, 249 F.2d 246 (9th Cir. 1957)	8
Montgomery Ward & Co. v. *Duncan*, 311 U.S. 243 (1940)	5, 6
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938)	9
Perkins v. *Standard Oil Co.*, 395 U.S. 642 (1969)	7

Page

Planters Mfg. Co. v. Protection Mut. Ins. Co., 380 F.2d 869 (5th Cir. 1957) 7, 8

Silverii v. Kramer, 314 F.2d 407 (3d Cir. 1963) 5, 6

Simpson v. Skelly Oil Co., 371 F.2d 563 (8th Cir. 1967) 6, 8

Simpson v. Union Oil Co., 396 U.S. 13 (1969) 10

Utah Pie Co. v. Continental Baking Co., 396 F.2d 161 (10th Cir.), *cert. denied*, 393 U.S. 860 (1968) 10

Zenith Radio Corp. v. Hazeltine Research, Inc., 397 U.S. 979 (1970) 10

Interlocutory Appeals Act, 28 U.S.C. § 1292(b) 9

James, F., Civil Procedure 51 (1965) 6

6A Moore, Federal Practice ¶ 59.05 [2] 7

6A Moore, Federal Practice ¶ 59.08 [5] 5, 6, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 947

FONTANA AVIATION, INC., A Corporation, *Petitioner*,

v.

BEECH AIRCRAFT CORPORATION, A Corporation, and HARTZOG-SCHNECK AVIATION, INC., A Corporation, *Respondents*.

BRIEF FOR RESPONDENT BEECH AIRCRAFT CORPORATION IN OPPOSITION

QUESTION PRESENTED

Whether the Court of Appeals erred as a matter of law in declining to disturb the trial court's discretionary grant of a new trial in the particular circumstances of this case.

STATEMENT[1]

This is an antitrust case, brought by petitioner, a former retail dealer in Beechcraft airplanes, against Hartzog-Schneck Aviation, Inc. (Hartzog), a whole-

---

[1] There are a substantial number of factual inaccuracies both in petitioner's description of the "antitrust violations" and in its discussion of "the fact and amount of damage." Because most of these are not germane to the only real issue presented by the petition, they will not be discussed in this brief.

sale distributor, and Beech Aircraft Corporation (Beech), the manufacturer of Beechcraft airplanes. Petitioner sought treble damages on the basis of injuries it allegedly suffered as a consequence both of its treatment by Hartzog, including Hartzog's refusal to continue contractual relations with it, and of petitioner's subsequent failure to secure an authorized Beechcraft dealership from another wholesale distributor.

Although petitioner had shown itself remarkably unsuccessful in the sale of Beechcraft airplanes,[2] to the point that it accumulated a substantial earnings deficit during the period in which it held contracts to sell such aircraft,[3] the jury awarded damages of $150,000. The award was necessarily premised chiefly upon petitioner's assertion that, notwithstanding its persistent inability to sell aircraft during its dealership, it would, had the dealership not been terminated, have sold a large number of aircraft in the period immediately following its termination.[4] This assertion was,

---

[2] In the last three calendar years prior to the termination of its dealership, petitioner participated in the sale of only two Beechcraft airplanes, both of them to a single customer. (Record 1858-59). The customer's interest in the larger of these airplanes was aroused, not by petitioner, but by Beech itself. *Id.* at 786).

[3] At the end of 1965, three and one-half months before petitioner's dealership contract was not renewed, it had suffered a cumulative loss of $32,471.62. (Record 1837-1839).

[4] Petitioner advanced various other claims involving situations arising before its dealership contract was not renewed. It asserted that it was entitled to the recovery of a penalty paid on an out-of-territory sale, that it had received an improperly small discount as to certain sales, and that it had in one case received an inappropriately small commission. These claims collectively amounted to only $69,000.

as the court below noted, "based almost solely upon opinion testimony of [petitioner's] 26 year old Board Chairman." (Petition, pp. A27-A28). Petitioner's Board Chairman averred that, but for the dealership's termination, it would have sold aircraft to some seventeen "prospects," each of which allegedly had requested demonstrations or price quotations. Petitioner elected neither to call at trial nor to proffer the deposition testimony of any of these seventeen "prospects" not one of whom was shown by petitioner to have bought from another source an airplane comparable to any of those that petitioner had previously sold at a price equivalent to or more than that which petitioner claimed it would have charged.[5] The Court of Appeals, with uncommon restraint, characterized this testimony as "rather weak" and observed that "its weight may be extremely questionable." (Petition, p. A28) The court added that upon retrial the District Court "may well desire to determine the admissibility of this type of evidence." (*Ibid.*)

Respondents moved for judgment notwithstanding the verdict and alternatively for a new trial. The ground stated for the motion for judgment n.o.v. was that there was insufficient evidence either of a statutory violation affecting petitioner or of injury to petitioner's business or property in a measurable amount to support a verdict for petitioner. Among the grounds presented for a new trial was the proposition that the verdict, both in determination of liability and

---

[5] One of the seventeen, who was within the range of compulsory process, was called by respondents. As the Court of Appeals observed, the testimony of this "prospect" directly "negatived the testimony of Fontana's Board Chairman." (Petition, p. A30)

in amount of assessed damages, was contrary to the clear weight of the evidence, and would, if permitted to stand, result in a miscarriage of justice.

The trial court found it unnecessary to resolve the question whether it should, in the exercise of its discretion, award respondents a new trial because the determination of liability was against the clear weight of the evidence, or because it was based in whole or in part on false evidence, or because it would, if permitted to stand, otherwise result in a miscarriage of justice. It ruled that respondents were entitled to judment n.o.v. because, even assuming *arguendo* that an antitrust violation had been established, petitioner had failed to present evidence on the question of damages adequate to support a jury verdict in its favor. Based upon the state of the record on this same issue, the court also exercised its discretion to grant, in the alternative, a new trial.

The Court of Appeals reviewed the evidence on damages, found that it was not "overwhelmingly and conclusively" (Petition, p. A30) against petitioner, and accordingly ruled that the trial court erred in its award of judgment to respondents notwithstanding the judgment. It declined, however, to disturb the trial court's order that respondents should alternatively be granted a new trial. In addition, the Court of Appeals examined an issue not reached by the trial court: whether respondents should be awarded either judgment n.o.v. or a new trial on the question of the existence of an antitrust violation. It held that although judgment n.o.v. on this issue would have been inappropriate, the trial court "should determine prior to a new trial whether the antitrust issue should again

be presented to the jury or whether a new trial should be confined to the issue of damages." (Petition, p. A26) The case was ordered to be remanded to the District Court.

ARGUMENT

Nothing in this case properly warrants the attention of this Court. The only real issue presented, whether the District Court's order of a new trial was a permissible exercise of its discretion under Rule 59, is patently inappropriate for review by certiorari. It is well settled that the granting of a new trial is a "matter resting in the sound discretion of the trial judge," and that its judgment as to this issue is not reviewable even by an intermediate appellate court "save in the most exceptional cases." *Silvestri* v. *Kramer*, 314 F.2d 407, 413 (3d Cir. 1963). See also *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 254 (1940); 6A Moore, Federal Practice ¶ 59.08 [5], p. 3820. Correspondingly, this Court has repeatedly held that certiorari should not issue to review an interlocutory order, including an order granting a new trial, "unless it is necessary to prevent extraordinary inconvenience and embarrassment." *American Construction Co.* v. *Jacksonville Railway*, 148 U.S. 372, 384 (1893). See also *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 257-258 (1916); *Cobbledick* v. *United States*, 309 U.S. 323, 324-325 (1940); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) (denying petition for certiorari on ground case not ripe for review). Such a lack of finality alone furnishes "sufficient ground" for the denial of certiorari. *Hamilton Shoe Co.* v. *Wolf Brothers*, *supra* at 258. Here, as in *Brotherhood of Locomotive Firemen* v.

Bangor & Aroostook R.R., supra, "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Id.* at 328.

This is not a matter merely of procedural fastidiousness. "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all." *Cobbledick* v. *United States, supra* at 324-325. Indeed, the finality principle has been styled a "cornerstone" of appellate procedure, F. James, Civil Procedure 51 (1965), indispensable both to avoid "enfeebling judicial administration" and to achieve a "healthy legal system." *Cobbledick* v. *United States, supra* at 325, 326.

Petitioner's efforts to escape the application of these principles are altogether unpersuasive. There is not the slightest basis for petitioner's suggestion that there has been some "usurpation" by the trial court of the jury's functions. It is clearly settled that a trial court may in its sound discretion set aside a verdict as contrary to the preponderance of the evidence. See, for example, *Montgomery Ward & Co.* v. *Duncan, supra* at 254; *Silverii* v. *Kramer, supra* at 413; *Aetna Casualty & Surety Co.* v. *Yeatts,* 122 F.2d 350, 352-353 (4th Cir. 1941); 6A Moore, Federal Practice ¶ 59.08 [5]. It is established no less plainly that a verdict may be set aside as against the weight of the evidence even if the state of that evidence is not such as to permit the entry of judgment n.o.v. See, for example, *Montgomery Ward & Co.* v. *Duncan, supra* at 254; *Aetna Casualty & Surety Co.* v. *Yeatts, supra* at 352-353; *Simpson* v. *Skelly Oil Co.,* 371 F.2d 563 (8th Cir.

1967); *Planters Mfg. Co.* v. *Protection Mut. Ins. Co.*, 380 F.2d 869 (5th Cir. 1967); Moore, *supra* at 3816-3819. Neither the Seventh Amendment[6] nor the cases adduced by petitioner[7] are inconsistent with these familiar rules. The result reached below represents, not usurpation of the jury's functions, but the application of well-settled principles by which a trial court, exercising sound judicial discretion, may act to prevent a miscarriage of justice.

Petitioner's remaining contention, that the new trial order was premised upon a mistake of law, is equally insubstantial. Petitioner has evidently misconceived

---

[6] Not surprisingly, petitioner offers no argument to support its suggestion that the result below is inconsistent with the requirements of the Seventh Amendment. Nothing is more clearly settled than that the authority of a trial court to grant a new trial under Rule 59 is entirely consonant with the terms of the Seventh Amendment. See, for example, Capital Traction Co. v. Hof, 174 U.S. 1 (1899); Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474 (1933); Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947); 6A Moore, Federal Practice ¶ 59.05[2], p. 3735.

[7] The cases offered by petitioner are entirely inapposite. In three of the cases, the verdict was set aside, not by the trial court, but by the Court of Appeals. Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690 (1962); Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946); Perkins v. Standard Oil Co., 395 U.S. 642 (1969). In the fourth, neither lower court set aside the verdict, and the issue was simply the petitioner's challenge to the sufficiency of the evidence upon which the verdict was based. Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 375 (1927). In none of the cases did this Court purport to restrict the trial court's discretionary authority under Rule 59 to set aside a verdict as contrary to the clear preponderance of the evidence. Petitioner has thus extracted isolated dicta from inapposite cases, and sought to construct from them support for a proposition not involved in those cases and directly inconsistent with numerous other decisions of this Court.

the character both of the trial court's order and of the Court of Appeals' judgment. The District Court held that the verdict should be set aside because it was contrary to the "overwhelming weight of the evidence." (Petition, p. A15). The Court of Appeals found petitioner's evidence as to damages "rather weak" and of "extremely questionable" weight (*Id.*, p. A28), but it nonetheless held that the evidence was not so "overwhelmingly and conclusively" (*Id.*, p. A30) against petitioner as to support a judgment for respondents notwithstanding the verdict. In these circumstances, it quite properly declined to disturb the trial court's conclusion that it would be a miscarriage of justice to permit the verdict for petitioner to stand. The two courts were divided, not by issues of law, but by somewhat different assessments of the relative flimsiness of petitioner's evidence. The portions of the opinion below in which petitioner purportedly discovers "issues of law" reflect merely the differing view taken by the Court of Appeals of the weight of various items of petitioner's evidence. If, as petitioner now asserts, these differing views as to the weight of evidence are "issues of law," every new trial order based upon evidentiary grounds would necessarily and inevitably fall with the reversal of an accompanying judgment n.o.v. This plainly is not the law. *Compare Simpson* v. *Skelly Oil Co., supra; Planters Mfg. Co.* v. *Protection Mut. Ins. Co., supra; Bennett* v. *D.C. Transit System, Inc.*, 298 F.2d 325 (D.C. Cir. 1962); *Moist Cold Refrigerator Co.* v. *Lou Johnson Co.*, 249 F.2d 246 (9th Cir. 1957).

The simple fact is that there here exists no basis either for any exception to the finality principle or, even apart from the question of finality, for review by

certiorari. There is nothing in this case that places it among those "exceptional" cases, *American Construction Co.* v. *Jacksonville Railway, supra* at 384, in which review of an interlocutory order has been permitted.[8] Whatever their importance to the parties, the issues presented in this litigation are neither novel nor of general significance. The question whether the trial court permissibly decided that there should be a new trial of an altogether ordinary treble damage action cannot conceivably be supposed "too important to be denied review * * *." *Compare Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949). See also *Hamilton Shoe Co.* v. *Wolf Brothers, supra* at 257. And, despite petitioner's allegations, there is no conflict between the result reached below and the prior judgments either of this Court or of the other courts of appeals.[9]

---

[8] The contrast between this case and those in which such review has been permitted is marked. In American Construction Co. v. Jacksonville Railway, *supra*, for example, the Court was prepared to review an interlocutory order only if a show cause proceeding first established that the decree of the lower court was void because one of the sitting judges was disqualified. *Id.* at 387. In other cases, review has been permitted because of a jurisdictional issue, the resolution of which was fundamental to the further conduct of the case. See, for example, Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 52 (1938); Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 685, n. 3 (1949). This Court has, in other words, employed criteria that correspond closely to those incorporated in the Interlocutory Appeals Act, 28 U.S.C. § 1292(b), by which district courts may certify to the courts of appeals for immediate resolution "a controlling question of law," as to which there is substantial ground for disagreement and the immediate resolution of which may materially advance the termination of the litigation. Nothing here can be thought to approach those criteria.

[9] On the contrary, as shown by cases which petitioner itself cites, the courts of appeals in appropriate circumstances in antitrust cases have themselves granted new trials or have left undisturbed district court grants of new trials, and this Court has declined

Petitioner would entangle this Court in an intensely factual revaluation of the sufficiency of its evidence as to damages, contrary to well-settled rules of ripeness and without even a colorable claim that this litigation satisfies the customary standards for review by certiorari. The consequence would be an obvious misallocation of this Court's limited resources and a repudiation of the trial court's discretionary authority under Rule 59 to grant or deny new trial motions. This case should instead be returned to the District Court, where that court may, after having first determined the proper limits of the new trial in accordance with the instructions of the Court of Appeals, submit the evidence to the jury "under proper rules of admissibility." (Petition, p. A31)[10]

---

itself to review such action (Florists' Nationwide Telephone Network v. Florists' Telegraph Delivery Association, 371 F.2d 263 (7th Cir.), *cert. denied*, 387 U.S. 909 (1967); Utah Pie Co. v. Continental Baking Co., 396 F.2d 161 (10th Cir.), *cert. denied*, 393 U.S. 860 (1968); Simpson v. Union Oil Co., 396 U.S. 13 (1969) (petition denied as to new trial issue)). No reason for review is presented here that did not also exist in those cases. The remaining case cited by petitioner (Zenith Radio Corp. v. Hazeltine Research, Inc., 397 U.S. 979 (1970)) presents the wholly different issue of alleged non-compliance with this Court's mandate in that very proceeding.

[10] Petitioner's lamentations as to the costs of this proceeding provide no basis for review of the new trial order. The rule holding such orders ordinarily nonreviewable would of course be nullified if review were justified simply by allegations that the proceeding had already proved expensive or that the new trial orders would, if upheld, result in additional expenses. Moreover, it is proper to observe that many of the costs about which petitioner now complains were the consequence of its insistence upon litigating uncontested issues at inordinate length.

CONCLUSION

For the reasons described above, the petition for writ of certiorari should be denied.

Respectfully submitted,

HENRY P. SAILER
CHARLES LISTER
888 Sixteenth Street, N. W.
Washington, D. C. 20006
Attorneys for Respondent
Beech Aircraft Corporation

Of Counsel:

COVINGTON & BURLING
888 Sixteenth St., N. W.
Washington, D. C. 20006